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8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA**

10 **SAN FRANCISCO DIVISION**

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12 COMMUNITIES FOR A BETTER
13 ENVIRONMENT, a California non-profit
corporation;

14 Plaintiff,

15 vs.

16 ACTION METAL RECYCLING, INC., a
17 California corporation

18 Defendant

19 Case No. C 07 02768 JCS

20 JOINT CASE MANAGEMENT
21 CONFERENCE AND FED. R. CIV. P. 26(f)
22 REPORT

23 Judge: Hon. Joseph C. Spero

24 Case Mgmt. Conf. Date: August 31, 2007

25 Case Mgmt. Conf. Time: 1:30 p.m.

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1 Pursuant to Fed. R. Civ. P. 26(f) and Local Civil Rules 16-1 and 16-9, Plaintiff
2 Communities for a Better Environment (“CBE”), and Defendant Action Metal Recycling, Inc.
3 (“Action Metal”), respectfully submit their Case Management Conference Statement and Rule
4 26(f) Report.

5 **JURISDICTION AND SERVICE**

6 This Court has federal subject matter jurisdiction over Plaintiff's claims based on the
7 Federal Water Pollution Control Act, 33 U.S.C. Section 1251 et.seq. (“Clean Water Act”). The
8 Clean Water Act includes a requirement that a plaintiff give a defendant sixty days' notice of its
9 intent to file suit. Plaintiff sent such notice on November 10, 2006. There are no unresolved
10 issues regarding personal jurisdiction or venue, and no additional parties to be served.

11 **FACTS**

12 **A. Events Underlying Action**

13 Plaintiff alleges violations of the Clean Water Act at the Defendant's scrap metal and
14 plastic recycling plant, located 385 Pittsburg Avenue in Richmond, California (“Facility”),
15 and seek declaratory and injunctive relief and civil penalties for Defendant's alleged
16 discharges of pollutants from the Facility into waters of the United States. Specifically,
17 Plaintiff alleges that the Defendant have failed to comply with the discharge, monitoring,
18 reporting, management practice requirements and other procedural and substantive
19 requirements of the State of California's General Permit No. CAS000001 [State Water
20 Resources Control Board] Water Quality Order No. 92-12-DWQ, as amended by Order No.
21 97-03-DWQ (“General Permit”). Plaintiff alleges Defendant became subject to the General
22 Permit's requirements in 1992, and Plaintiff further alleges Defendant is subject to penalties
23 for violations of the Order and Clean Water Act for the five years preceding this action.
24

25 **B. Plaintiff's Factual Assertions**

26 Plaintiff asserts that the following facts are both material and true.
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1 1. The Facility has discharged and continues to discharge storm water
2 with every rain event generating more than 0.1 inches of rain.

3 2. The Facility's discharges contain pollutants at concentrations that
4 cause or contribute to violations of water quality standards.

5 3. The Facility has discharged and continues to discharge non-storm
6 water to waters of the United States.

7 4. The Defendant ~~have~~ has failed to adequately develop and implement a
8 Storm Water Pollution Prevention Plan ("SWPPP") with best management practices
9 ("BMPs") that constitute best available technology and best conventional technology, to
10 reduce or eliminate pollutants in storm water discharges from the Facility so that they do not
11 cause or contribute to violations of water quality standards.

12 5. The Defendant has failed to develop and implement an adequate
13 monitoring and reporting program ("MRP") as required by the General Permit.

14 **C. Defendant's Factual Assertions**

15 Defendant asserts that the following facts are both material and true.

16 1. There is no evidence of any pollutants being discharged from
17 Defendant's Facility, either by storm water discharge or otherwise.

18 2. Defendant's Facility has a SWPPP in place; it fully conforms to best
19 management practices, and it is in full compliance with the requirements of the Clean Water
20 Act.

21 3. Defendant's MRP is fully consistent with the General Permit.

22 **LEGAL ISSUES**

23 **A. Plaintiff's Statement of Legal Issues**

24 In Plaintiff's view, the parties dispute the following legal issues:

25 1. Whether the Facility discharges storm water containing pollutants at
26 concentrations in excess of those authorized by the General Permit.

27 2. Whether the Facility discharges non-storm water in violation of the
28 General Permit.

1 3. Whether the Facility's SWPPPs meet the requirements of the General
2 Permit.

3 4. Whether the Defendant have implemented the SWPPPs as required by
4 the General Permit.

5 5. Whether the Facility's MRPs meet the requirements of the General
6 Permit.

7 6. Whether the Defendant have implemented the MRPs as required by
8 the General Permit.

9 **B. Defendant's Statement of Legal Issues**

10 In Defendant's view, the parties dispute the following legal issues in addition to those addressed
11 above:

12 1. Whether Plaintiff has standing to bring its Complaint.

13 2. Whether Plaintiff can state a claim under the citizen suit provision of the
14 Clean Water Act (33 U.S.C. Section 1251, et seq.).

15 **PROCEDURAL HISTORY & MOTIONS**

16 There are no pending motions. Plaintiff anticipates moving for summary judgment
17 on the issues where it believes there is no factual dispute. Plaintiff does not intend to add or
18 delete parties. Defendant contends that Action Metal anticipates moving for dismissal based
19 upon its belief that Plaintiff does not have standing to pursue this action.

20 **AMENDMENT OF THE PLEADINGS**

21 Plaintiff does not intend to amend the pleadings. Defendant has not yet filed any
22 responsive pleadings in this action.

23 **DISCOVERY**

24 **A. Rule 26(a)(1) Disclosures**

25 Pursuant to Fed. R. Civ. P. 26(a)(1)(E), the parties have stipulated that they will
26 exchange initial disclosures on or before September 21, 2007.

1 **B. Plaintiff's Anticipated Discovery**

2 Regarding liability, Plaintiff will seek information concerning pollutant and
3 stormwater management practices at the Facility; non-stormwater use and disposal; sampling
4 procedures, practice and results; procedures for developing and updating the Facility's
5 SWPPP and MRP; and other related information as necessary after review of Defendant's
6 initial disclosures. Regarding penalties, Plaintiff will seek information concerning the
7 Defendant's financial and corporate status; Defendant's history of environmental violations;
8 and other related information as necessary after review of Defendant's initial disclosures.

9 Plaintiff proposes a phased discovery plan, limiting initial discovery to matters
10 relevant to establishing liability under the Clean Water Act and General Industrial
11 Stormwater Permit. Plaintiff anticipates this discovery can be accomplished as provided
12 under the Federal Rules of Civil Procedure, without need for a more elaborate discovery
13 plan. Proposed discovery deadlines are set out below, with other proposed case management
14 deadlines.

15 **C. Defendant's Anticipated Discovery**

16 Defendant intends to conduct discovery regarding the information Plaintiff has collected
17 or is otherwise aware of regarding the operation or history, or both, of Defendant's Facility.
18 Defendant will also seek discovery regarding Plaintiff's participation in citizen suits brought under
19 the Clean Water Act and other environmental statutes.

20 Defendant agrees with Plaintiff's proposed phased discovery plan, except that Defendant
21 proposes that initial discovery matters shall include, in addition to discovery related to liability,
22 any discovery regarding either parties' previous involvement in similar Clean Water Act litigation
23 or proceedings. Defendants believe discovery can be carried out pursuant to the Federal Rules of
24 Civil Procedure without any additional provisions. Defendant joins Plaintiff's proposed discovery
25 and case management schedule, as set forth below, except where noted.

26 **EVIDENCE PRESERVATION**

1 The parties have agreed to instruct all their officers, directors, agents, employees,
2 contractors, and consultants in writing to preserve all documents potentially relevant to this case,
3 including not to erase any electronic files or e-mail messages, or otherwise destroy any documents,
4 that concern or relate to compliance with the General Permit at the Facility, including
5 development and implementation of SWPPPs at the Facility, development and implementation of
6 any storm water BMPs at the Facility, research regarding testing or investigation, or both, and all
7 monitoring of storm water and non-storm water discharges from the Facility.

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9 **RELIEF**

10 **1. Plaintiff's Request for Relief**

11 Plaintiff seeks an injunction requiring the Defendant to eliminate all non-stormwater
12 discharges and implement measures necessary to reduce pollutants in storm water discharges
13 to less than EPA Benchmark Values and applicable water quality standards, and comply with
14 all the General Permit's monitoring, reporting and management requirements, including
15 updating and implementing SWPPPs and MRPs.

16 Plaintiff also asks that the Court impose civil penalties pursuant to CWA section
17 309(d) of the Act, 33 U.S.C. § 1319(d). In calculating the amount of civil penalties, the
18 Court should consider the maximum penalty (\$32,500 per day per violation) as well as
19 Defendant's economic benefit from not complying with the CWA, Defendant's history of
20 violations or efforts to comply, and the adequacy of the penalty to deter future violations.

21 Finally, Plaintiff seeks costs and attorneys fees, with the latter set equal to the lodestar
22 calculated employing the prevailing commercial rates charged by attorneys in the San
23 Francisco legal market with comparable experience to Plaintiff's counsel times the number of
24 hours Plaintiff's counsel reasonably spent representing Plaintiff in this matter.

25 **2. Defendant's Response**

26 Defendant seeks Plaintiff's Complaint be dismissed in its entirety.

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28 **SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION**

1 The parties have filed a Joint Stipulation and Proposed Order regarding ADR, and are
2 working in good faith to reach a settlement. Plaintiff sent Defendant a written settlement
3 offer on August 17, 2007. Defendant's counsel received the settlement offer on August 17,
4 2007, and is attempting to arrange a meeting with Action Metal to evaluate the settlement
5 offer. Defendant anticipates providing Plaintiff with a response.

6 **CONSENT TO MAGISTRATE JUDGE**

7 The Parties consent to proceed before a magistrate judge.

8 **OTHER REFERENCES**

9 This case may not be suitable for reference to binding arbitration, a special master, or the
10 Judicial Panel on Multidistrict Litigation.

11 **NARROWING OF ISSUES**

12 Plaintiff advocates bifurcation of proceedings in this case into liability and remedy phases,
13 with litigation on remedy (other than preliminary injunctive relief) held in abeyance until liability
14 has been established. This case would proceed most efficiently if bifurcated, because liability can
15 be decided promptly by the court, while questions of remedy may require deeper inquiry and
16 investment of resources by the parties. Therefore Plaintiff proposes bifurcating the case as a
17 means of narrowing the issues to be decided at once. Defendant concurs that bifurcation of the
18 proceedings is logical in this matter.

21 **SCEDULING**

22 Plaintiff proposes that the parties limit their discovery in the liability phase of the
23 proceeding to matters reasonably calculated to lead to admissible evidence on questions of
24 liability or preliminary injunctive relief, except that the parties may conduct discovery on
25 matters that are related to both liability and remedy under this claim during the liability
26 phase. Defendant proposes the parties limit their discovery during the liability phase to
27 matters of liability, preliminary injunctive relief, standing, and either party's previous
28 involvement in similar Clean Water Act litigation or proceedings.

1 Plaintiff proposes the following case schedule for the liability phase of this case (with
2 the schedule for the remedy phase of the case to be set after the liability phase is concluded).

3 Defendant concurs with Plaintiff's proposed case schedule except where parenthetically
4 noted.

- 5 • Deadline for Propounding Fact Discovery: April 17, 2008
- 6 • Deadline for Filing Motions for Leave to Amend Pleadings or Add Parties: May 16,
7 2008
- 8 • Deadline for Designation of Expert Witnesses: May 19, 2008
- 9 • Deadline for Serving Expert Witness Reports: June 23, 2008
- 10 • Deadline for Designation of Rebuttal Expert Witnesses: July 18, 2008
- 11 • Deadline for Serving Rebuttal Expert Witness Reports: August 18, 2008
- 12 • Deadline for Propounding Expert Discovery/Noticing Expert Depositions: October 7,
13 2008
- 14 • Deadline for Filing Dispositive Motions: October 7, 2008 (counsel shall not calendar
15 such motions for hearing any later than October 13, 2008)
- 16 • Deadline for Counsel to Meet and Confer Concerning Proposed Trial Exhibits,
17 Witness Lists and Summaries of Expected Witness Testimony and Motions in
18 Limine: November 14, 2008
- 19 • Deadline for Filing Motions in Limine: December 1, 2008
- 20 • Deadline to Submit Joint Pretrial Conference Statement (which shall include
21 Proposed Trial Exhibits, Witness Lists and Summaries of Expected Witness
22 Testimony): December 22, 2008
- 23 • Pretrial Conference: January 12, 2009
- 24 • Trial Date: February 9, 2009

25 **TRIAL**

26 Plaintiff is not requesting a jury trial. Plaintiff anticipates a one day bench trial on liability
27 issues. Defendant is demanding a jury trial. Defendant believes a jury trial will take two to three
28

1 days.

2 **SERVICE LIST**

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13 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

14 Plaintiff and Defendant have filed their "Certification of Interested Entities or Persons"
15 required by Civil Local Rule 3-16. There are no other entities known by Plaintiff or Defendant to
16 have either: (i) a financial interest in the subject matter in controversy or in a party to the
17 proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of
18 the proceeding.

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24 Dated: August 20, 2007

25 /s/

26 Philip Huang
Attorney for Plaintiff
COMMUNITIES FOR A BETTER ENVIRONMENT

1 Dated: August 20, 2007

2 /s/
3 W. Lee Smith
4 TRUTANICH MICHEL, LLP
5 Attorney for Defendant
6 ACTION METAL RECYCLING, INC

7 **IT IS SO ORDERED.**

8 Date: _____

9 _____
10 Honorable Joseph C. Spero
11 United States Magistrate Judge
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